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JAMALUDIN MD KASIM

v.

PP

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FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
RAUS SHARIF FCJ
HELILIAH MOHD YUSOF FCJ
[CRIMINAL APPEAL NO: 05-141-2009(J)]

C

18 OCTOBER 2010

CRIMINAL PROCEDURE: *Appeal - Fact, finding of - Concurrent findings of fact - Whether Federal Court slow to interfere with concurrent findings of fact*

D

CRIMINAL PROCEDURE: *Prosecution - Gap in evidence - Witness not material witness - Witness not essential to the unfolding of the narrative on which prosecution's case was based - Witness offered to defence at the end of prosecution's case - Whether serious gap caused in the prosecution's case*

E

CRIMINAL PROCEDURE: *Prosecution - Witnesses - Failure to call witness - Witness not material witness - Witness not essential to the unfolding of the narrative on which prosecution's case was based - Witness offered to defence at the end of prosecution's case - Whether serious gap*

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caused in the prosecution's case - Whether such failure fatal to prosecution's case - Whether trial court had addressed prosecution's failure - Whether any misdirection by way of non direction - Whether any miscarriage of justice occasioned

G

EVIDENCE: *Witness - Failure of prosecution to call witness - Witness not material witness - Witness not essential to the unfolding of the narrative on which prosecution's case was based - Witness offered to defence at the end of prosecution's case - Whether serious gap caused in the prosecution's case - Whether trial court had addressed prosecution's*

H

failure - Whether any misdirection by way of non direction - Whether any miscarriage of justice occasioned

The appellant was charged with one charge of trafficking in dangerous drugs and two charges of possession of dangerous drugs

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under the Dangerous Drugs Act 1952 ('the Act'). He was convicted on all three charges in the High Court. On the first charge, he was

sentenced to death. On the two possession charges, he was sentenced to concurrent terms of imprisonment. His appeal to the Court of Appeal was dismissed and he appealed to the Federal Court. In the Federal Court, counsel submitted *inter alia* that the failure to call a material witness – one D/Kpl Ravidass – resulted in a serious gap in the prosecution's case entitling the appellant to an acquittal.

Held (dismissing the appeal)
Per Raus Sharif FCJ delivering the judgment of the court:

(1) Both the High Court and the Court of Appeal had made concurrent findings of fact concerning: (i) the appellant's physical and *mens rea* possession of the drugs; (ii) his failure to rebut the presumption of trafficking under s. 37(da) of the Act; and (iii) his failure to raise any reasonable doubt. The Federal Court is usually slow to interfere with concurrent findings of fact, unless there are serious errors in reaching such findings. *Lee Ah Seng & Anor v. PP* (refd); *Krishna Rao Gurumurthi v. PP and Another Appeal* (refd). (para 13)

(2) The principle of law established in the case of *Ti Chuee Hiang v. PP* relied upon by appellant's counsel when challenging the prosecution's failure to call D/Kpl Ravidass, was not a principle of general application. The principle did not apply to the facts of the instant case. D/Kpl Ravidass was not a material witness. He was not a witness whose testimony was essential to the unfolding of the narrative on which the prosecution's case was based. The absence of his testimony did not create a serious gap in the prosecution's case. *Ti Chuee Hiang v. Public Prosecutor* (dist). (paras 19, 20 & 21)

(3) The failure of the prosecution to offer D/Kpl Ravidass to be cross-examined before the close of the prosecution's case was not fatal to the prosecution's case and not could result in the appellant's acquittal. In the instant case, D/Kpl Ravidass was offered to the defence at the end of the prosecution's case. *Ti Chuee Hiang v. Public Prosecutor* (dist). (para 23)

(4) In the instant case, the failure by the prosecution to call D/Kpl Ravidass as a prosecution's witness had been addressed by both the trial judge and the Court of Appeal. Both courts ruled that the failure to call D/Kpl Ravidass as a prosecution's witness was

A not fatal to the prosecution's case. Thus, the issue of misdirection by way of non direction which could occasion a miscarriage of justice did not arise in the instant case. *Ti Chuee Hiang v. Public Prosecutor* (dist). (para 24)

B ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu dituduh dengan satu pertuduhan mengedar dadah berbahaya dan dua pertuduhan memiliki dadah berbahaya di bawah Akta Dadah Berbahaya 1952 ('Akta'). Beliau disabitkan atas ketiga-tiga pertuduhan oleh Mahkamah Tinggi. Bagi pertuduhan pertama beliau
C dijatuhkan hukuman mati. Bagi dua pertuduhan milikan, beliau telah dijatuhkan hukuman pemenjaraan yang berjalan secara serentak. Rayuan beliau ke Mahkamah Rayuan telah ditolak dan beliau merayu ke Mahkamah Persekutuan. Di Mahkamah Persekutuan,
D peguam antara lain berhujah bahawa kegagalan memanggil seorang saksi penting – seorang D/Kpl Ravidass – telah menyebabkan lompang yang serius pada kes pendakwaan, sekaligus mewajarkan pembebasan perayu.

Diputuskan (menolak rayuan)

E **Per Raus Sharif HMP menyampaikan penghakiman mahkamah:**

(1) Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah membuat dapatan fakta 'concurrent' mengenai (i) milikan fisikal dan *mens rea* dadah oleh perayu; (ii) kegagalan beliau
F menyangkal anggapan pengedaran di bawah s. 37(da) Akta; dan (iii) kegagalan beliau membangkitkan sebarang keraguan munasabah. Mahkamah Persekutuan biasanya tidak ghairah untuk campurtangan dalam dapatan-dapatan concurrent fakta, kecuali terdapat kekhilafan serius dalam mencapai keputusan.
G *Lee Ah Seng & Anor v. PP* (dirujuk); *Krishna Rao Gurumurthi v. PP and Another Appeal* (dirujuk).

(2) Prinsip undang-undang yang dirumuskan di dalam kes *Ti Chuee Hiang v. Public Prosecutor* yang dijadikan pergantungan oleh
H peguam perayu bilamana mencabar kegagalan pendakwaan memanggil D/Kpl Ravidass, bukanlah suatu prinsip yang terpakai secara keseluruhan. Prinsip tersebut tidak terpakai kepada fakta kes di sini. D/Kpl Ravidass bukanlah seorang saksi yang material. Beliau bukan seorang saksi yang penting bagi
I menyerlahkan naratif-naratif di atas mana kes pendakwaan

diasaskan. Ketiadaan testimoninya tidak mencipta apa-apa lompang serius pada kes pendakwaan. *Ti Chuee Hiang v. Public Prosecutor* (dibezakan).

(3) Kegagalan pendakwaan untuk menawarkan D/Kpl Ravidass untuk diperiksa-balas sebelum penutupan kes pendakwaan tidaklah fatal kepada kes pendakwaan dan tidak boleh menyebabkan pembebasan perayu. Dalam kes semasa, D/Kpl Ravidass telah ditawarkan kepada pembelaan di akhir kes pendakwaan. *Ti Chuee Hiang v. Public Prosecutor* (dibezakan).

(4) Dalam kes semasa, kegagalan pendakwaan untuk memanggil D/Kpl Ravidass sebagai saksi pendakwaan telah dikupas oleh kedua-dua hakim bicara dan Mahkamah Rayuan. Kedua-dua mahkamah memutuskan bahawa kegagalan memanggil D/Kpl Ravidass sebagai saksi pendakwaan tidaklah fatal kepada kes pendakwaan. Oleh itu, isu salah arahan melalui ketiadaan arahan yang boleh membawa kepada salah laksana keadilan tidak berbangkit dalam kes semasa. *Ti Chuee Hiang v. Public Prosecutor* (dibezakan).

Case(s) referred to:
Jamaluddin Md Kassim v. PP [2010] 5 CLJ 928 CA ***(refd)***
Krishna Rao Gurumurthi v. PP and Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Senevirate v. The King [1936] 3 All ER 36 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 12(2), 37(da), 39A, 39B(1)(a), (2), 40

Other source(s) referred to:
Blackstone's Criminal Practice 2006, pp 1568, 2278

For the appellant - Gobind Singh Deo (S Prakash with him); M/s Gobind Singh Deo & Co
For the respondent - Fatnin Yusof DPP

[Editor's note: For the Court of Appeal judgment, please see Jamaludin Md Kasim v. PP [2010] 5 CLJ 928.]

Reported by Andrew Christopher Simon

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JUDGMENT

Raus Sharif FCJ:

[1] The appellant was charged before the High Court at Johor Bahru with three charges: first, under s. 39B(2) of the Dangerous Drug Act 1952 (DDA) with trafficking in 32.6 grams of monoacetylmorphine; second, under s. 12(2) of the DDA read with s. 39A of the same Act for possession of 3.99 grams of methamphetamine; and third, under s. 6 of the DDA for possession of 2.02 grams of cannabis. The appellant was convicted of all these charges. He was sentenced to death on the first charge, five years imprisonment and ten strokes of the rotan on the second charge and four years imprisonment on the third charge. The imprisonment terms on the second and the third charge were ordered to run concurrently.

[2] Aggrieved, the appellant appealed to the Court of Appeal. On 20 August 2009, the appellant's appeal was dismissed. The Court of Appeal upheld the conviction and sentence imposed on the appellant. The appellant now appeals to this court against the conviction and sentence.

[3] After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same. We first start with the facts.

[4] On 23 July 2003 at about 6am, acting on information received, Chief Inspector Arman bin Ibrahim (SP5) and a police party consisting of D/Kpl Jasmani bin Ali Othman (SP6) and several other police personnel conducted a narcotics raid on a house at No. 50C, Kg. Hajjah Fatimah, Batu 3 1/2 Jalan Tampoi Majidee, Johor Bahru ("the premise"). While conducting a search on the premise, SP5 heard human movements behind the wooden wall of a room. Upon examination, he found a sliding panel on the wooden wall covering a window. He pushed apart the panel and opened the window which led to a dark alley. He shone a torch into the alley and saw the appellant squatting on the floor holding a blue sling bag (P13) in his left hand and a white plastic bag (P20) on his right hand. The appellant was shivering. SP5 then directed SP6 and another policeman to enter the dark alley and bring the appellant out. PW5 found P13 and P20 to contain the incriminating drugs which form the subject matter of the three charges.

[5] SP5 later handed the drugs to Inspector Muhamad Johar bin Yusof (SP7) who thereafter sent them to the Chemist, Abdullah bin Mohd Yusof (SP3) for analysis. Upon analysis, SP3 confirmed the identity and quantity of the drugs to be 32.6 grams of monoacetylmorphine; 3.99 grams of methamphetamine; and 2.02 grams of cannabis, which are dangerous drugs under the DDA.

[6] The appellant, in his defence, claimed that he hid himself in the alley when he detected the presence of the police because he was in breach of an order under the Emergency (Public Order and Prevention of Crime) Ordinance 5 (1969) ("PCO Order") made against him. Under the PCO Order he was supposed to report himself in Kelantan and he had not complied with the order since December 2002. The appellant denied of having physical possession of P13 and P20 or knew the contents thereof. The appellant further claimed that he was spotted and asked to come out of the alley by an Indian policeman, D/Kpl Ravidass and not by PW5 and PW6. He also alleged that he was beaten by the police with two canes, while he was in the room and this was seen by the wife.

Findings Of The High Court

[7] At the close of the prosecution's case, the trial judge found the prosecution has proved a *prima facie* case against the appellant based on maximum evaluation on both elements of physical possession and *mens rea* possession. On the issue of physical possession, the trial judge stated:

> On the issue of possession, I am satisfied that the prosecution has successfully proved these physical and mental elements of possession which lead me to hold that the accused was in actual possession. The factual matrix adduced through the prosecution's witnesses in particular SP5 and SP6 reveals that the accused was found holding P13 and P20 in his hands – it was in his physical possession and hence he had custody and control over it.

[8] On the issue of *mens rea* possession, the trial judge found as follows:

> As regards the mental element – ie, knowledge of contents of P13 and P20 can only be proved by inference from surrounding circumstances – relevant factors are from where the drugs were found, how it was recovered, reaction of the accused, the manner it was kept and weight of the drugs (see *Suretheran Selvaraju v. PP* [2005] 2 CLJ 264).

A In this connection the factor of the accused hiding in the dark alley behind a false wall panel which is not locked holding in his hand P13 and P20 the plastic bag and the factor of the weight of the drugs ie, 32.6 grams of monoacetylmorphine are pointers that the drugs are clearly not for his personal consumption. Though his
B reaction on shivering is by itself not evidence of knowledge nevertheless taking into consideration that the drugs were found in P13 and P20 which was physically held by him in his hands and the amount of drugs recovered to my mind has the cumulative effect of establishing the mental element of knowledge which leads me to conclude that the prosecution has successfully establish that the
C accused actually knew the nature of the offending exhibits found in P13 and P20.

By reason thereof the presumption of trafficking under section 37(da) arises. I am satisfied that at the close of the prosecution's case a *prima facie* case has been made out and hence the accused
D is called upon to enter his defence on all 3 charges.

[9] In analysing the defence on the issue of possession, the trial judge found that the appellant's defence was one of denial. He stated as follows:

E The whole scheme of the accused defence is one of denial - denial of holding P13 and P20 in his hands, denial of having knowledge as to the contents of P13 and P20 which he asserts was found in the alley after he had come out of the alley and into the room, denial that it was SP6 and not D/Kpl Ravidass who found him in the alley
F and denying that it was 3 police personnel that entered into the alley and seeing him holding P13 and P20. The denial aforesaid does not to my mind cast a reasonable doubt on the prosecution's case (see *PP v. Nur Hassan bin Salip Hashim & Anor* [1993] 2 CLJ 551).

In my judgment the case of *Chan Chor Shuh v. PP* [2003] 1 CLJ
G 501 (C.A) relied on by learned Defence Counsel is distinguishable on its facts. There the Court found many infirmities in the prosecution's case whereas in the case at hand I have made the finding that SP5 and SP6 are witnesses of truth. The issue of D/Kpl Ravidass presence in the room does not and cannot to my
H mind create a reasonable doubt.

[10] The trial judge also found that the appellant's defence in regards the issue of the PCO Order and the existence of the two canes which was allegedly used by the police to beat the appellant was an afterthought. This is what he said:

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Further it is my finding that the accused defence was an afterthought as regards both the issue of the PCO and the existence of 2 canes that was allegedly used to beat the accused in that the PCO issue was raised after the prosecution closed its case and no cross-examination was made to the raiding party. The issue of the existence of the 2 canes which was allegedly used to beat the accused was never put to any of the prosecution's witness. As was stated in the case of *Hamidon bin Mat Yatim v. PP* [1995] 3 CLJ 724:

> question were not put to … in the cross-examination … and subsequently they can be dismissed as mere afterthought.

Findings Of The Court Of Appeal

[11] At the Court of Appeal, every finding of the trial judge was vigorously challenged by the appellant. However, the Court of Appeal could not find any fault with the findings and reasoning of the trial judge (see *Jamaludin Md Kassim v. Public Prosecutor* [2010] 5 CLJ 928). The Court of Appeal held that from SP5's and SP6's evidence, D/Kpl Ravidass was not the police personnel who spotted the appellant in the alley and asked to come out as suggested by the defence. The Court of Appeal found that D/Kpl Ravidass was not even in the house at the time of the appellant's arrest. Thus, there was no necessity for the prosecution to call D/Kpl Ravidass to give evidence, just because it was put to SP5 and SP6 under cross-examination that D/Kpl Ravidass was the person who spotted the appellant in the alley and requested him to come out. It was held that the non-calling D/Kpl Ravidass by the prosecution had not resulted in procedural unfairness to the appellant to occasion a miscarriage of justice.

[12] The Court of Appeal also held that since the findings of the trial judge were based on credibility or otherwise of the prosecution's witnesses, in particular SP5 and SP6, and of the appellant as well as his witness, the trial judge's view is entitled to great respect. The Court of Appeal found no reason to interfere with those findings. In regard to the appellant's defence, the Court of Appeal held that the trial judge had not erred when he concluded that the appellant's explanation about his fear of the police because he had contravened the PCO order, was a product of an afterthought.

A **Findings Of This Court**

[13] It is clear in this appeal that both the High Court and the Court of Appeal had made the concurrent findings of fact that the appellant was in physical possession and *mens rea* possession of the
B dangerous drugs. Both courts had also made a concurrent findings that the appellant's defence had failed on the balance of probabilities to rebut the presumption of trafficking under s. 37(da) of DDA, or capable of raising any reasonable doubt as to the truth of the prosecution's case. Being concurrent findings of fact, at both
C levels, this court, as the final appellate courts is normally slow in interfering with such findings unless there are serious error committed in coming to such findings (see *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1, and *Krishna Rao Gurumurthi v. PP and Another Appeal* [2009] 2 CLJ 603).

D **[14]** The learned counsel for the appellant however submitted that there is a serious issue of law that arises in this appeal which if resolved in the appellant's favour, would entitle him to an acquittal. The issue pertains to what was said by the Federal Court in *Ti*
E *Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1. In that case, a team of policeman had planned and organised a trap to arrest a drug dealer, Ti Chuee Hiang. A meeting was arranged through the help of an informer between a policeman posed as a heroin buyer with Ti Chuee Hiang for the sale of heroin, which ended as a
F concluded deal. The deal was carried out and Ti Chuee Hiang was arrested when he was delivering the heroin to the police. Ti Chuee Hiang was charged under s. 39B(1)(a) of DDA. Ti Chuee Hiang's defence that he was an innocent carrier of heroin was rejected by the trial judge. He was convicted and sentenced to death.

G **[15]** The Federal Court in acquitting Ti Chuee Hiang, *inter alia* held that:

> While the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has the duty to call all
H necessary witness essential to the unfolding of the narrative of the prosecution's case to establish proof against the accused beyond all reasonable doubt. At the very least, the prosecution should make them available for cross-examination by the defence. If the prosecution failed to fulfil this duty, the accused must be acquitted.

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[16] Thus, learned counsel for the appellant submitted that in the instant appeal, D/Kpl Ravidass was a material witness and failure by the prosecution to call him as a witness has resulted a serious gap in the prosecution's case. He contended that without the evidence of D/Kpl Ravidass, the trial judge could not have conducted a maximum evaluation of the reliability and credibility of SP5 and SP6. He submitted that the prosecution at the very least should make D/Kpl Ravidass available for cross-examination by the defence. This was never done, and as such the appellant is entitled to an acquittal.

[17] The learned counsel for the appellant further submitted that the timing of making a witness available for cross-examination must be before the close of the prosecution's case. In support, he referred to two passages in *Blackstone's Criminal Practice* 2006 at pp. 1568 and 2278 where it is stated:

> As an alternative to calling a witness and examining him in the normal way, it is open for the prosecution counsel to tender a witness for cross-examination. Counsel merely calls the witness, establishes his name and address, and then invites the defence to ask any question they wish.
>
> Usually cross-examination follows immediately after examination in chief, but witnesses are sometimes merely tendered by the prosecution for cross-examination. Such a witness is called by the prosecution, sworn, asked no question in chief other than his name and address, and then cross-examination by the defence (see *Brooke* [1819] 2 Stark 472).

[18] The learned Deputy Public Prosecutor did not dispute the point that when the prosecution's witness is made available for cross-examination by the defence, it must be made before the close of the prosecution's case. However, she submitted that in the instant case there is no necessity to do the same. The reason is, unlike the witness in *Ti Chuee Hiang v. Public Prosecutor*, D/Kpl Ravidass was not a material witness that must be called or offered to the defence to be cross-examined before the close of the prosecution's case.

[19] Having read and re-read *Ti Chuee Hiang v. Public Prosecutor*, we agree with the learned Deputy Public Prosecutor that the principle of law established in that case cannot be of general application as suggested by learned counsel for the appellant. *Ti Chuee Hiang v.*

A *Public Prosecutor* was a decision peculiar to its own facts. In that case, the witness in issue was the informer, who enticed Ti Chuee Hiang to walk into a trap which the police had pre-set. On the facts, Federal Court found that the informer having regard to his role, was not a mere informer, but had assumed the mantle of an
B agent provocateur. He was the active instrument without whose intervention Ti Chuee Hiang might never have been arrested. The informer's identity was no longer a secret and thus he had lost the protection from disclosure of identity normally accorded to informers under s. 40 of DDA.

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[20] It was on those facts and circumstances that the Federal Court ruled it was the obligation of the prosecution to call and examine the informer as its witness as he came within the category of witnesses described by Lord Roche in *Senevirate v. The King*
D [1936] 3 All ER 36, "witnesses essential to the unfolding of the narratives on which the prosecution case is based". And if he was not called, at the very least make him available for cross-examination by the defence.

[21] We have no hesitation in accepting the above principle. But,
E we are of the view it is not applicable to the facts of our case. In our case, the witness, D/Kpl Ravidass was not a material witness in regard to the arrest of the appellant and the recovery of P13 and P20, which contained the dangerous drugs. D/Kpl Ravidass cannot be termed as a witness essential to the unfolding of the narrative of
F the prosecution's case to establish proof against the appellant beyond reasonable doubt. The absence of his testimony did not create a serious gap in the prosecution's case.

[22] The material witnesses in our case were SP5 and SP6. SP5 in
G his evidence said that when he spotted the appellant in the alley, he directed SP6 and another policeman to enter the alley and bring the appellant out. What was said by SP5 was confirmed by SP6. The trial judge ruled SP5 and SP6 to be credible witnesses and gave his reasons for doing so. The Court of Appeal agreed with trial
H judge. We have no reasons to disagree. We too are of the view that there is no necessity for the prosecution to call D/Kpl Ravidass to give evidence, just because it was put to SP5 and SP6 under cross-examination that D/Kpl Ravidass was the person who spotted the appellant in the alley and requested him to come out.

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[23] We are also of the view that the failure of the prosecution to offer D/Kpl Ravidass to be cross-examined before the close of the prosecution's case was not fatal to the prosecution's case and as such it not could result in the acquittal of the appellant. This is especially so when D/Kpl Ravidass, at the end of the prosecution's case was offered to the defence whereas in *Ti Chuee Hiang v. Public Prosecutor*, the informer was never offered as a witness to the defence.

[24] Another point is this. In *Ti Chuee Chiang v. Public Prosecutor*, learned counsel for Ti Chuee Hiang in the course of his submission before the High Court criticised the prosecution for failing to call the informer, but nowhere in his judgment did the trial judge direct his attention to this point. This was ruled by the Federal Court to be a serious misdirection by way of non direction which had occasioned a grave miscarriage of justice. In our case, the failure by the prosecution to call D/Kpl Ravidass as a prosecution's witness has been addressed by both the trial judge and the Court of Appeal. Both courts ruled that the failure to call D/Kpl Ravidass as a prosecution's witness was not fatal to the prosecution's case. Thus, the issue of misdirection by way of non direction which can occasion a miscarriage of justice does not arise in this case.

[25] We also wish to state that we have considered the other authorities submitted by learned counsel for the appellant. We found them to be of no assistance to the appellant. At the end of it, we are satisfied that the conviction of the appellant is safe. We therefore dismissed the appeal. The conviction and sentence imposed on the appellant are affirmed.